Supreme Court, U.S.
FILED
OCT 26 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1597

IN THE

Supreme Court Of The United States

October Term, 1989

THE BOARD OF EDUCATION of the WESTSIDE COMMUNITY SCHOOLS (Dist. 66), et al.,
Petitioners,

v.

BRIDGET C. MERGENS, et al.,
Respondents.

On Writ of Certiorari To
The United States Court of Appeals
For the Eighth Circuit

BRIEF FOR THE SOUTHERN CENTER FOR LAW & ETHICS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

ALBERT L. JORDAN*
WILLIAM S. BREWBAKER III
TIMOTHY S. RITCHIE
Wallace, Brooke & Byers
2000 SouthBridge Parkway
Birmingham, Alabama 35209
(205) 870-0555

DAVID M. SMOLIN
Assistant Professor of Law
Cumberland School of Law
Samford University
Birmingham, Alabama 35229

*Counsel of Record

QUESTIONS PRESENTED

1. Whether public school officials violate the Free Exercise or Establishment Clauses of the First Amendment when they prohibit students from meeting on school property for voluntary, student-initiated religious discussions and Bible study on equal terms with other students.

2. Whether public school officials violate the Free Speech Clause of the First Amendment when they prohibit students from meeting on school property for voluntary, student-initiated religious discussions and Bible study on equal terms with other students.

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Authorities iv

Interest of Amicus Curiae 1

Summary of Argument 3

Argument 4

I. Public School Officials Violate the Free Exercise And Establishment Clauses Of The First Amendment When They Prohibit Students From Meeting On School Property For Voluntary, Student-Initiated Religious Discussions And Bible Study On Equal Terms With Other Students 5

A. This Court Has Forbidden Governmental Hostility Toward Religion 5

B. The School Officials' Conduct Amounted To Constitutionally Impermissible Hostility Toward Religion 10

II. Public School Officials Violate The Free Speech Clause Of The First Amendment When They Prohibit Students From Meeting On School Property For Voluntary, Student-Initiated Religious Discussions And Bible Study On Equal Terms With Other Students 14

A. Westside Officials Have Created A Limited Public Forum For Student Groups During Scheduled Club Periods 15

TABLE OF CONTENTS — (Continued)

Page

B. School Officials May Not Prove The Existence Of A Nonpublic Forum Merely By Articulating Its Boundaries After The Fact 18

C. Petitioners Have Not Shown A Compelling State Interest To Justify Singling Out Respondents For Exclusion From The Club Forum 21

D. Even If The Westside Club Program Were A Nonpublic Forum, Petitioners' Actions Would Be Constitutionally Prohibited Because They Amount To Discrimination Against Respondents' Viewpoint 23

Conclusion 25

TABLE OF AUTHORITIES

Cases: *Pages*

Bender v. Williamsport Area School District, 475 U.S. 534 (1986) 15

Bethel School District No. 403 v. Fraser, 478 U.S. 675 (1986) 15, 20, 21

Bishop v. Aronov, et al., No. CV-88-G-1591-5 (N.D. Ala. September 21, 1988) 3

Board of Airport Commissioners v. Jews for Jesus, ___ U.S. ___, 107 S.Ct. 2568 (1987) 19

Board of Education v. Allen, 392 U.S. 236 (1968) 22

Board of Education v. Pico, 457 U.S. 853 (1982) 25

Brown v. Board of Education, 347 U.S. 483 (1953) 11

Cornelius v. NAACP Legal Defense and Educational Fund Inc., 473 U.S. 788 (1985) 15, 18, 24

County of Allegheny v. American Civil Liberties Union, ___ U.S. ___, 109 S.Ct. 3086 (1989) 6, 11, 14

Everson v. Board of Education, 330 U.S. 1 (1947) 11, 22

Hazelwood School District v. Kuhlmeier, ___ U.S. ___, 108 S.Ct. 562 (1988) ..... passim

Lemon v. Kurtzman, 403 U.S. 602 (1971) 6, 21

Lynch v. Donnelly, 465 U.S. 668 (1984) 6, 7, 13

McDaniel v. Paty, 435 U.S. 618 (1978) 6, 8, 9, 23

Mergens v. Board of Education, 867 F.2d 1076 (8th Cir. 1989) 4, 18

TABLE OF AUTHORITIES — (Continued)

Cases: *Pages*

Mergens v. Board of Education, slip op. (D. Neb. 1988) ..... passim

Mueller v. Allen, 463 U.S 388 (1983) 22

Papish v. Board of Curators, 410 U.S. 667 (1973) 21

School District of Abington Township v. Schempp, 374 U.S. 203 (1963) 8, 10, 13

Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969) 19

Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969) 14, 20, 21

Walz v. Tax Comm'n, 397 U.S. 664 (1970) 9, 13

West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943) 25

Widmar v. Vincent, 454 U.S. 263 (1981) ..... passim

Witters v. Washington Dept. of Service for the Blind, 474 U.S. 481 (1986) 22

Zorach v. Clauson, 343 U.S. 306 (1952) 5, 6, 9, 11

Miscellaneous

A. Reichly, *Religion in American Public Life* 165 (1986) 13

Fish, *Liberalism Doesn't Exist,* 1987 Duke L.J. 997 13

Madison, *Memorial and Remonstrance Against Religious Assessements.* Reprinted in an appendix to *Everson v. Board of Education,* 330 U.S. 1 (1947) 11

TABLE OF AUTHORITIES — (Continued)

Miscellaneous: *Pages*

W. Moberly, *The Crisis in the University* 56 (1949) 13

McConnell, *Accommodation of Religion*, 1985 S.Ct. Rev. 1 10

A. Tocqueville, *Democracy in America*, 292 (Anchor Book Ed. 1969) 10

Williamsburg Charter, published by Williamsburg Charter Foundation (June 25, 1989) (available at Williamsburg Charter Foundation, Washington, D.C.) 8, 12, 25

No. 88-1597

IN THE

Supreme Court Of The United States

October Term, 1989

THE BOARD OF EDUCATION of the WESTSIDE COMMUNITY SCHOOLS (Dist. 66), et al.,
Petitioners,

v.

BRIDGET C. MERGENS, et al.,
Respondents.

On Writ of Certiorari To
The United States Court of Appeals
For the Eighth Circuit

BRIEF FOR THE SOUTHERN CENTER FOR LAW & ETHICS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE

Amicus curiae, The Southern Center of Law & Ethics (the "Center") is a non-profit corporation founded in January 1985 and based in Birmingham, Alabama. Written consent of all parties to the Center's filing of this brief accompanies it.

The purpose of the Center is to develop and assist members of the legal and lay communities in understanding how to integrate a world and life philosophy with law and social ethics. Its geographic focus is principally the State of Alabama. Policies are set by a board of directors composed of four lawyers and two laymen. Activities are conducted by Executive Director J. Scott Houser, a well-known figure locally in public affairs. Houser's activities for the Center include public speaking, interaction with interested law students and members of the academic community, publication of articles, and identification and engagement of lawyers for participation in litigation on important public issues related to the Center's purposes.

The Equal Access Act, and the constitutional considerations inherent in the question of whether religious clubs may be treated differently from other high school clubs, is one of particular interest to the Center. Throughout the past several years the Center has participated in activities in an effort to encourage fair treatment of religion by state boards of education, school administrators, principals and teachers. The Center's director has reviewed numerous textbooks proposed for approval by the Alabama State Board of Education to ensure that religion was treated fairly both in the context of the role of religion in history and the contribution of religion to ethical development. The director has lectured to faculty members at several universities on fair treatment of religion in the classroom.

The Center's purpose through these activities, and through the filing of this Brief of Amicus Curiae, is not to establish any particular religious content within high school or college curriculums. It is, rather, to assist the fostering of fair treatment of religion and religious students in public education. The Center is therefore

interested in preserving the ability of religious student groups to utilize high school facilities on the same basis that is allowed to nonreligious student groups.

The outcome of this case is of particular interest to the Center because of its present involvement in litigation concerning the censorship by the University of Alabama of a professor's classroom and on-campus extra-curricular religious speech. *Bishop v. Aronov, et al.*, No. CV-88-G-1591-5 (N.D. Ala. September 21, 1988). While there may be differences between a university and a secondary school setting, and between student and faculty speech, the objectionable conduct in both cases is the exercise of discretion by school administrators in a manner hostile to religion.

SUMMARY OF ARGUMENT

Public school officials, as government representatives, are prohibited by the Free Speech, Free Exercise and Establishment Clauses of the First Amendment from denying students the right to meet on school property for voluntary, student-initiated religious discussions and Bible study on equal terms with other students.

The Free Exercise and Establishment Clauses of the First Amendment prohibit public school officials from discriminating against students on the basis of religion. The central value these clauses embody is religious liberty. Petitioners violated these provisions when they denied Respondents the benefit of meeting on school property on the same basis as other students. Their actions served to banish Respondents from the political community, thereby sending the message that students interested in learning about and practicing religion are outsiders. Such segregation on the basis of religion, like discrimination based on race, is constitutionally impermissible.

By allowing a wide variety of student-initiated clubs to meet on school property after school hours, Petitioners have created a public forum. Having created a public forum, they are prohibited by the Free Speech Clause of the First Amendment from denying Respondents the privilege of meeting on school grounds absent a compelling state interest. Petitioners have not shown a compelling state interest to justify singling out Respondents for exclusion from the club forum.

Even if the Westside club program were a nonpublic forum, Petitioners' actions would be constitutionally prohibited because they amount to discrimination against Respondents' viewpoint. Viewpoint discrimination is impermissible even in a nonpublic forum. While Petitioners avowedly encourage a multitude of viewpoints by allowing students to meet in a variety of groups after school, they selectively exclude a religious viewpoint from making an equal contribution. The First Amendment prohibits such discrimination.

ARGUMENT

Introductory Statement

The undisputed evidence in this case is that only one student group has ever been precluded from meeting on the property of Westside High School ("WHS") after school hours by the Westside school officials. *Mergens v. Board of Education,* 867 F.2d 1076, 1077 (8th Cir. 1989). This group, organized by the Respondents, sought to conduct religious discussions and Bible study. While the policy and practice of WHS is to allow students to form clubs and to meet after school, WHS abandoned this policy when Bridget Mergens and Andrea Simmonds requested permission to start a "Bible Club." WHS allowed a chess club, scuba diving club, and various

social clubs to meet; however, school officials turned down Respondents' request on the ground that permitting their proposed club to meet would violate the Establishment Clause. The sole ground, therefore, for denying Respondents' request was the religious content of their speech. In forbidding Respondents' group from meeting on an equal basis with other student-initiated groups, the WHS officials demonstrated constitutionally proscribed hostility toward religion.

I. PUBLIC SCHOOL OFFICIALS VIOLATE THE FREE EXERCISE AND ESTABLISHMENT CLAUSES OF THE FIRST AMENDMENT WHEN THEY PROHIBIT STUDENTS FROM MEETING ON SCHOOL PROPERTY FOR VOLUNTARY, STUDENT-INITIATED RELIGIOUS DISCUSSIONS AND BIBLE STUDY ON EQUAL TERMS WITH OTHER STUDENTS.

A. This Court Has Forbidden Governmental Hostility Toward Religion.

This Court has repeatedly made clear that the First Amendment religion clauses preclude the government from discriminating against citizens because they desire to exercise religious liberty. In *Zorach v. Clauson,* 343 U.S. 306 (1952), in which a time-release program for religious training away from public school property was upheld, the Court discussed the impermissibility of governmental hostility toward religion. Dismissing the idea that government may not accommodate the "spiritual needs" of the citizenry, *id.* at 314, the Court declared:

> To hold that [government] may not [accommodate religion] would be to find in the Constitution a requirement that the government show a callous indifference to religious groups.

> That would be preferring those who believe in no religion over those who do believe. Government may not finance religious groups, nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person. But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence.

Id. at 314. This view was reiterated in *Lynch v. Donnelly,* 465 U.S. 668, 673 (1984), where the Court declared that the Constitution "forbids hostility" toward any religion.

While it is clear that governmental hostility toward religion is constitutionally impermissible, the Court has not been uniform in stating *why* this is so. Several opinions suggest that such hostility violates the Establishment Clause. In *Lemon v. Kurtzman,* 403 U.S. 602, 613 (1971), the Court held that the Establishment Clause precludes the government from acting so as to "inhibit religion." A similar view was expressed in *McDaniel v. Paty,* 435 U.S. 618 (1978), where the Court unanimously struck down a section of the Tennessee Constitution which prohibited clergy members from serving as state legislators. Justice Brennan wrote in concurrence that the provision violated the Establishment Clause because it manifested "patent hostility toward, not neutrality respecting, religion . . . and, in sum, has a primary effect which inhibits religion." *Id.* at 636.

Justice O'Connor has expressed the view that governmental hostility toward religion violates the Establishment Clause because of the "message" of exclusion sent to those discriminated against. *Lynch v. Donnelly,* 465 U.S. at 688. (O'Connor, J., concurring). In *County of*

Allegheny v. American Civil Liberties Union, Justice O'Connor stated:

> [T]he Establishment Clause "prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community." The government violates this prohibition if it endorses or disapproves of religion. "Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."

___ U.S. ___, ___, 109 S.Ct. 3086, 3118 (1989) (O'Connor, J., concurring) *quoting Lynch v. Donnelly,* 465 U.S. at 688 (1984) (O'Connor, J., concurring) (citations omitted). Government hostility toward religion, by definition, makes religion relevant to standing in the political community.

The obvious difficulty with the view that the government violates the Establishment Clause when it demonstrates hostility toward religion is that such hostility does not serve to *establish* religion. At most, it establishes irreligion. Since the text of the Establishment Clause does not explicitly forbid the government from discriminating against religion, it is not self-evident that government hostility toward religion is unconstitutional.

Several Justices have suggested that because the central value of the First Amendment Religion Clauses is religious liberty, governmental hostility toward religion is constitutionally impermissible. As Justice Goldberg has observed:

> The First Amendment's guarantees, as applied to the States through the Fourteenth Amendment, foreclose not only laws "respecting an

establishment of religion" but also those "prohibiting the free exercise thereof." These two proscriptions are to be read together, and in light of the single end which they are designed to serve. This basic purpose of the religion clauses of the First Amendment is to promote and assure the fullest possible scope of religious liberty and tolerance for all and to nurture the conditions which secure the best hope of attainment of that end.

The fullest realization of true religious liberty requires that government neither engage in nor compel religious practices, that it effect no favoritism among sects or between religion and nonreligion, and that it work deterrence of no religious belief.

School District of Abington v. Schempp, 374 U.S. 203, 306 (Goldberg, J., joined by Harlan, J., concurring.)[1]

The *Williamsburg Charter*[2] also makes clear that both the Establishment Clause and the Free Exercise Clause are designed to facilitate religious liberty. This document, whose signers include, *inter alia,* Chief Justice Rehnquist, former Chief Justice Burger, and former presidents Carter and Ford, represents the culmination of an effort to achieve a national consensus on the importance and meaning of the Religion Clauses of the First Amendment. The *Charter* declares that:

> [T]he two clauses are essentially one provision for preserving religious liberty. Both parts, No establishment and Free exercise, are to be

[1]Justice Brennan expressed a similar view: "[T]he Court's decisions have indicated that the limits of permissible governmental action with respect to religion under the Establishment Clause must reflect an appropriate accommodation of our heritage as a religious people whose freedom to develop and preach religious ideas and practices is protected by the Free Exercise Clause." *Paty,* 435 U.S. at 638.

[2]Published by Williamsburg Charter Foundation (June 25, 1989) (available at Williamsburg Charter Foundation, Washington, D.C.).

> comprehensively understood as being in the service of religious liberty as a positive good. . . . [A]ll faiths are free to enter vigorously into public life and to exercise such influence as their followers and ideas engender. Such democratic exercise of influence is in the best tradition of American voluntarism and is not an unwarranted "imposition" or "establishment."

Id. at pp. 16-17.

The religious heritage of the American people also dictates that government not be hostile to religion. In *Zorach,* the Court noted that:

> We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma.

343 U.S. at 313-14. Justice Brennan has written that when the government shows hostility toward religion it is "at war with our national tradition as embodied in the First Amendment's guaranty of free exercise of religion." *Paty,* 435 U.S. at 639.[3]

[3]Similarly, in *Walz,* where tax exemptions for religious property were validated, the Court declared that few concepts are

> more deeply embodied in the fabric of our national life, beginning with pre-Revolutionary colonial times, than for the government to exercise at the very least this kind of benevolent neutrality toward churches and religious exercise generally so long as none was favored over others and none suffered interference.

Walz v. Tax Comm'n, 397 U.S. 664, 676-77 (1970).

Hostility toward religion robs American democratic institutions of a major source of the values which inform them. The American political tradition presupposes a government which does not seek to shape its people's values, but rather is itself shaped by them. Accordingly, religion has traditionally played a central role in the development of public virtue.[4] For this reason, Tocqueville described religion as "the first of [America's] political institutions."[5] Thus, governmental hostility toward religion is antithetical to the American experience:

> Neither government nor this Court can or should ignore the significance of the fact that a vast portion of our people believe in and worship God and that many of our legal, political and personal values derive historically from religious teachings. Government must inevitably take cognizance of the existence of religion . . . .

Abington School District v. Schempp, 374 U.S. 203, 306 (Goldberg, J., concurring, joined by Harlan, J.).

B. The School Officials' Conduct Amounted To Constitutionally Impermissible Hostility Toward Religion.

Whether one appeals to the Establishment Clause, the "central value" of the First Amendment, or the nation's religious heritage, the school officials' decision to exclude the Respondents' group on the ground that it was intended for religious discussion and practice amounted to constitutionally impermissible hostility toward religion. Regarding the Establishment Clause concerns, the Respondents were certainly sent "a message . . . that they are outsiders, not full members of the

[4]McConnell, *Accommodation of Religion,* 1985 S.Ct. Rev. 1, 18.
[5]A. Tocqueville, *Democracy in America* 292 (Anchor Book Ed. 1969).

political community." *County of Allegheny,* ___ U.S. at ___, 109 S.Ct. at 3119 (O'Connor, J., concurring). Moreover, the students were subjected to "unique disabilities" simply because they desired to learn about and practice religion. The primary effect of this action was certainly to inhibit religion.

With regard to the nation's religious heritage, the school officials' decision was manifestly at odds with an historical "attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma." *Zorach,* 353 U.S. at 313. Indeed, the school officials' conduct revealed the opposite attitude. It demonstrated an intention to banish the Respondents from the public community, thereby degrading them "from the equal rank of citizens"[6] allowed to communicate and express themselves with public approval.

Banishing students from the public school grounds on the basis of their desire to discuss and practice religion sends not only the message that they are outside the acceptable community, but that they are inferior to it as well. In denominating the Respondents' group as unacceptable to meet on school property, the school authorities treated the Respondents in a manner analogous to the school children in *Brown v. Board of Education,* 347 U.S. 483 (1953). In *Brown* the Court stated:

> [S]egregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro race.

[6]Madison, *Memorial and Remonstrance Against Religious Assessments,* Reprinted in an appendix to *Everson v. Board of Education,* 330 U.S. 1, 64 (1947).

347 U.S. at 494. Religion forms a central part of the identity of the committed believer. Discriminating against religious students with "the sanction of law" by not allowing them to meet on equal terms with other students surely sends the message that they are inferior outsiders.

The School Board's actions in this case are symptomatic of a fundamental misconception that religion has no part in American public life. Concerning such actions the *Williamsburg Charter* declares:

> Too often in recent disputes over religion and public affairs, some have insisted that any evidence of religious influence on public policy represents an establishment of religion and is therefore precluded as an improper "imposition." Such exclusion of religion from public life is historically unwarranted, philosophically inconsistent and profoundly undemocratic. The Framers' intention is indisputably ignored when public policy debates can appeal to the theses of Adam Smith and Karl Marx, or Charles Darwin and Sigmund Freud but not to the Western religious tradition in general and the Hebrew and Christian Scriptures in particular. Many of the most dynamic social movements in American history, including that of civil rights, were legitimately inspired and shaped by religious motivation. Freedom of conscience and the right to influence public policy on the basis of religiously informed ideas are inseverably linked. In short, a key to democratic renewal is the fullest possible participation in the most open possible debate.

Williamsburg Charter, at 21.[7]

---

[7]One commentator has observed:

> Society that excludes religion totally from its public life, that seems to regard religion as something against which public life must be protected, is bound to foster the impression that religion is either irrelevant or harmful.

A. Reichly, *Religion in American Public Life* 165 (1986). *See also*, Fish, *Liberalism Doesn't Exist*, 1987 Duke L.J. 997, 1000.

The Petitioners cannot justify their actions by claiming that they demonstrated "neutrality" toward religion. Strict neutrality toward religion sometimes amounts to great hostility. Neutrality toward religion, when it results in exclusion thereof, teaches that religion is of secondary importance. It teaches this is not a way that invites debate, but in a fashion where it is accepted silently, but all the more insidiously.[8] The exclusion of religious activities under the guise of "neutrality" manifests, in effect, an official repudiation of religious activity. As Justice Goldberg observed in *Abington*:

> [U]ntutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it.

374 U.S. at 306 (Goldberg, J., concurring, joined by Harlan, J.).[9]

---

[8]W. Moberly, *The Crisis in the University* 56 (1949).

[9]The necessity that the government encourage religious liberty, rather than act with indifferent neutrality, is augmented due to the fact that the public sector is ever-expanding. As Justice Kennedy noted:

> Rather than requiring government to avoid any action that acknowledges or aids religion, the Establishment Clause permits government some latitude in recognizing and accommodating the central role religion plays in our society. *Lynch v. Donnelly, supra*, 465 U.S. at 678, 104 S.Ct. at 1361; *Walz v. Tax Comm'n, supra*, 397 U.S. at 669, 90 S.Ct. at 1411. Any approach less sensitive to our heritage would border on latent hostility toward religion, as it would require government in all its multifaceted roles to

Petitioners' "devotion to the secular," evidenced by their decision to exclude the religious, amounted to affirmative hostility toward religion. It served to discriminate against Respondents on a constitutionally impermissible basis. For this reason, the decision of the Court of Appeals should be affirmed.

II. PUBLIC SCHOOL OFFICIALS VIOLATE THE FREE SPEECH CLAUSE OF THE FIRST AMENDMENT WHEN THEY PROHIBIT STUDENTS FROM MEETING ON SCHOOL PROPERTY FOR VOLUNTARY, STUDENT-INITIATED RELIGIOUS DISCUSSIONS AND BIBLE STUDY ON EQUAL TERMS WITH OTHER STUDENTS.

The school officials' violation of Respondents' free speech rights provides an additional basis on which to affirm the Court of Appeals. The extent to which educational officials may exercise discretion in regulating speech protected by the First Amendment is a question which this Court has considered on more than one occasion. Although "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969), school officials may regulate student speech in many

---

acknowledge only the secular, to the exclusion and so to the detriment of the religious. A categorical approach would install federal courts as jealous guardians of an absolute "wall of separation," sending a clear message of disapproval. In this century, as the modern administrative state expands to touch the lives of its citizens in such diverse ways and redirects their financial choices through programs of its own, it is difficult to maintain the fiction that requiring government to avoid all assistance to religion can in fairness be viewed as serving the goal of neutrality.

County of Allegheny, ___ U.S. at ___, 109 S.Ct. at 3135.

respects in the interest of ensuring the fulfillment of the school's educational mission. Thus, school officials may censor student publications in order to protect the privacy rights of other students, *Hazelwood School District v. Kuhlmeier*, ___ U.S. ___, 108 S.Ct. 562 (1988), and they may punish students for offensive speech during school assembly programs, *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986). However, cases such as *Hazelwood* and *Fraser* do not provide a carte blanche for school officials to suppress speech they dislike. The Constitution does not permit school officials to suppress religious speech on state property without adequate, and, in this case, compelling, justification.

A. Westside Officials Have Created A Limited Public Forum For Student Groups During Scheduled Club Periods.

The constitutional limitations applicable to the Westside officials are set forth in *Widmar v. Vincent*, 454 U.S. 263 (1981). The Court's now familiar holding in *Widmar* is that where a University has made its meeting rooms generally available to registered student organizations, it has thereby created a "limited public forum,"[10] thus requiring school officials to justify any content-based speech regulation by showing a compelling state interest. *Id.* at 267.

The similarity of this case to *Widmar* is too apparent to be seriously questioned.[11] Just as in *Widmar*, where

---

[10]A "limited" or "created" public forum is one "created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects." *Cornelius v. NAACP Legal Defense and Educational Fund*, 473 U.S. 788, 802 (1985).

[11]*Bender v. Williamsport Area School District*, 475 U.S. 534, 555-56 (1986) (Powell, J., dissenting) ("The only arguable distinction between *Widmar* and this case is that *Widmar* involved University students while the groups here are composed of high school students. . . . I do not believe —

the University permitted "registered student organizations" to use University facilities for meetings, 454 U.S. at 265, so here, "WHS students are allowed to become members of various student groups and clubs, all of which meet after school hours on school grounds," *Mergens*, 867 F.2d at 1077. In *Widmar*, University policy was to "routinely provide[] University facilities for the meetings of registered organizations." 454 U.S. at 265. Westside officials likewise placed no significant restrictions on club formation:

> There is no written school policy concerning the formation of clubs. Rather, students wishing to form a club present their goals and objectives to a school official who analyzes the stated goals and whether or not the proposed club is consistent with Board Policy 5610. Until [Respondents] attempted to form a Christian Bible Study Club in January 1985, no club had ever been denied access to the school.

Mergens, 867 F.2d at 1077.[12]

In seeking reversal of the Eighth Circuit's opinion below, Petitioners make the unpersuasive argument that their closure of the Westside club forum to religious speech is justified on the basis that religious speech is unrelated to Westside's curriculum. In furtherance of

particularly in this age of massive media information — that the few years difference in age between high school and college students justifies departing from *Widmar*.").

[12]In fact, School Board Policy 5610, reproduced in *Mergens v. Board of Education*, (D. Neb. 1988), slip op. at 10, provides almost no basis upon which a school official could decide whether the formation of a student-initiated club is permissible. Aside from prohibiting club sponsorship by outside political, religious or discriminatory organizations, the policy merely affirms the role of such clubs in "developing citizenship, wholesome attitudes, good human relations, knowledge and skills" and states that such clubs "are directly under control of the school administration." It is thus difficult to account for the district court's statement that the facts in *Bender* and *Widmar* "differ markedly from the policy in force at WHS," *id.* at 10, n. 4.

this argument, Petitioners assert that Board Policy 5610 limits clubs to those which are "curriculum-related." *Mergens*, slip op. at 11. Applications of this "standard" of curriculum-relatedness are justified by articulated "connections" between the school curriculum and the student clubs. *Id.*[13]

The Court below rightly held that the students' constitutional rights could not hang on such a slender thread. It concluded that reliance on petitioners' "curriculum-related" standard vested impermissible discretion in school authorities to rationalize content-based suppression of speech after the fact:

> Allowing such a broad interpretation of "curriculum-related" would make the [Equal Access Act] meaningless. A school's administration could simply declare that it maintains a closed forum and choose which student clubs it wanted to allow by tying the purposes of those student clubs to some broadly defined educational goal. At the same time the administra-

[13]The court summarized Petitioners' testimony concerning the "connections" between the permitted clubs and school curriculum as follows:

> Dr. Findley and Dr. Tangdall ... explained that Interact, a service club which is peripherally connected to Rotary International, is related to sociology and psychology, and that participation can result in a better grade for a student; chess club provides an arena for logical thinking, and is, therefore, an extension of a WHS logic class; Subserfers, it is urged, is related to the goals of the physical education department; the National Honor Society is related to all courses and is an honor and not, technically, a club; photography club is really a class which is related to the art department; Welcome to Westside likewise is not a club but a matching of new students with older students in an effort to provide a better educational ambience; Future Business Leaders of American fosters the development of business skills and is related to WHS business and economics courses; Zonta is the female counterpart to Interact; and Student Advisory Board and Student Forum are generally related to democracy, citizenship, and, indirectly, to the classes on government.

Slip op. at 11-12.

> tion could arbitrarily deny access to school facilities to any unfavored student club on the basis of its speech content. . . . A public secondary school cannot simply declare that it maintains a closed forum and then discriminate against a particular student group on the basis of the content of the speech of that group.

Mergens, 867 F.2d at 1078. This Court should adopt the Eighth Circuit's conclusion that Respondents' exclusion from the forum cannot be justified on the basis of a determination by petitioners that the club was not curriculum-related. To hold otherwise would serve to vest school officials with the discretion to exclude any speech they deem undesirable.

B. School Officials May Not Prove The Existence Of A Nonpublic Forum Merely By Articulating Its Boundaries After The Fact.

This Court has never permitted public officials to justify a policy that property is not open for expressive activity merely by articulating the "boundaries" of the forum after the fact. A finding that a forum is nonpublic is available only where there is (1) clear evidence of an intent not to establish a public forum or (2) evidence that "the nature of the property is inconsistent with expressive activity." *Cornelius v. NAACP Legal Defense and Educational Fund,* 473 U.S. at 803. The school's policy and prior practice suggest that school officials had no intent to limit the forum prior to their groundbreaking decision to reject Respondents' request to form a club. Rather the district court's description of Dr. Findley's and Dr. Tangdall's strained testimony as to the "curriculum-relatedness" of certain permitted clubs, *see supra,* n. 13, smacks of an after-the-fact rationalization of a discriminatory decision. In this respect it is

reminiscent of the familiar tactic of facilitating unconstitutional discrimination by vesting power in government officials to restrict speech without providing accompanying standards limiting the exercise of such power. *See, e.g., Shuttlesworth v. City of Birmingham,* 394 U.S. 147 (1969).[14]

The school officials also cannot sustain their finding that the forum was not open to Respondents' group on the ground that the nature of school property is inconsistent with such expressive activity. In *Hazelwood,* ___

---

[14]The danger inherent in permitting government officials to use their discretion to suppress protected speech has not gone unnoticed. In *Board of Airport Commissioners v. Jews for Jesus,* ___ U.S. ___, 107 S.Ct. 2568 (1987), the Board of Airport Commissioners of Los Angeles International Airport passed a resolution declaring the airport to be closed to all "First Amendment activities." *Id.* at ___, 107 S.Ct. at 2570. In an unsuccessful effort to save the resolution from a finding of facial overbreadth, the Board argued that the resolution should be construed to prohibit only speech which was not "airport related." *Id.* at ___, 107 S.Ct. at 2572. The Court, in a unanimous opinion, held that officials could not constitutionally base a decision to suppress particular speech on a governing standard as vague as "airport relatedness":

> [T]he vagueness of this suggested construction itself presents serious constitutional difficulty. The line between airport-related speech and nonairport-related speech is, at best, murky. The petitioners, for example, suggest that an individual who reads a newspaper or converses with a neighbor at LAX is engaged in permitted "airport-related" activity because reading or conversing permits the traveling public to "pass the time." We presume, however, that petitioners would not so categorize the activities of a member of a religious or political organization who decides to "pass the time" by distributing leaflets to fellow travelers.

Id. at ___, 107 S.Ct. at 2573 (citations omitted).

The "curriculum-related" standards allegedly drawn from Board Policy 5610 no more confine the discretion of Westside officials in censoring Respondents' religious speech than the "airport-related" standard would have confined airport officials in suppressing that of citizens engaging in protected activities at LAX. Petitioners have claimed that Policy 5610 is the basis for the claim that clubs must be "curriculum-related," *see Mergens,* slip op. at 11, but the Policy provides no ascertainable basis for their determination, first, that clubs must be "curriculum-related" and, second, for making a judgment as to which clubs are "curriculum-related." Thus, Board Policy 5610 is unconstitutionally overbroad and the actions of the officials taken in reliance on the Policy were impermissible.

U.S. ___, 108 S.Ct. 562 and *Fraser*, 478 U.S. 675, the Court concluded that the nature of the high school setting justified censoring student speech. However, these cases expressly did *not* abandon the long acknowledged recognition that:

> [Students] cannot be punished merely for expressing personal views on the school premises — whether "in the cafeteria" or on the playing field, or on the campus during the authorized hours" . . . unless school authorities have reason to believe that such expression will "substantially interfere with the work of the school or infringe on the rights of other students."

Hazelwood, 108 S.Ct. 567, *quoting*, *Tinker*, 393 U.S. at 512-13.

While the school may disassociate itself from speech that is inconsistent with the fundamental values of public school education, *id.*, religious speech has not been regarded by this Court as contrary to these fundamental values. According to *Fraser*, "tolerance of divergent political and religious views" are among the values the public education system is designed to foster. 478 U.S. at 681. It would seem strange indeed if *exclusion* of Respondents' speech were deemed an appropriate means of teaching this tolerance. The school officials' interest in preserving the values of the educational system clearly thus does not justify exclusion of student religious activity during club periods.

Furthermore, there is no need for school authorities to exclude or censor Respondents' speech in order to disassociate themselves from its religious content. Participation in club activities is entirely voluntary. Such activities are hardly sponsored by the school in the same sense as a journalism class newspaper distributed on campus, or a speech given at a mandatory school assembly. Respondents will not have gained "the imprimatur of the school" merely by winning official permission to meet on campus. *See Hazelwood*, 108 S.Ct. at 570, n. 3, *citing*, *Papish v. Board of Curators*, 410 U.S. 667 (1973) (per curiam) (distribution of underground newspaper).

In sum, the content of Respondents' speech hardly disqualifies it from the general protection afforded under *Tinker*. Certainly, neither *Fraser* nor *Hazelwood* purports to change these general principles, and hence neither should be deemed contrary to the decision of the Eighth Circuit. Indeed, there has been no suggestion that a Bible club will be any more disruptive to the school's educational mission than any other club.

C. Petitioners Have Not Shown A Compelling State Interest To Justify Singling Out Respondents For Exclusion From The Club Forum.

In order to justify a content-based speech exclusion from a public forum or a limited public forum, the government must demonstrate a compelling state interest. *Widmar*, 454 U.S. at 270. The school officials' articulated "compelling interest" here — avoiding an "establishment of religion" — is without merit. *Widmar*, 454 U.S. at 273. On several occasions the Court has held that public programs which provide benefits to religion and nonreligion alike do not violate the Establishment Clause.

In *Widmar v. Vincent*, the Court held that it would not violate the Establishment Clause for a university to make public facilities available to religious speakers provided that the same facilities were open for use by a "broad class of non-religious speakers." 454 U.S. at 274. Applying the three-part *Lemon* test, the Court concluded that such a nondiscriminatory policy would advance a secular purpose by "provid[ing] a forum in

which students can exchange ideas," *id.* at 271, n. 10, and would "avoid entanglement with religion," *id.*, n. 11. Concerning whether the policy would have the primary effect of advancing religion, the Court held:

> [W]e are not oblivious to the range of an open forum's likely effects. It is possible — perhaps even foreseeable — that religious groups will benefit from access to University facilities. But this Court has explained that a religious organization's enjoyment of merely "incidental" benefits does not violate the prohibition against the "primary advancement" of religion.
>
> We are satisfied that any religious benefits of an open forum at UMKC would be "incidental" within the meaning of our cases.

Id. at 273 (citations omitted).

The Court has also permitted incidental benefits to religion in the high school setting without finding an Establishment Clause violation. For instance in *Mueller v. Allen*, 463 U.S. 388 (1983), the Court upheld a Minnesota statute allowing taxpayers, in computing their state income tax, to deduct expenses incurred in providing "tuition, textbooks and transportation" for their children attending elementary or secondary school. In *Everson, supra*, the Court concluded that a State may reimburse parents for bus fares incurred in sending their children to sectarian schools. In *Board of Education v. Allen*, 392 U.S. 236 (1968), the Court permitted the government to loan textbooks to children attending religious schools.[15]

The rationale underlying *Widmar, Mueller, Allen*, and *Everson* is dispositive in the present case. Respondents

[15]The Court reached a similar result in *Witters v. Washington Dept. of Service for the Blind*, 474 U.S. 481 (1986), holding that a state may extend financial assistance under a vocational rehabilitation program to a blind person who wanted to study at a Christian college.

are merely asking that the school allow them to meet after school on equal terms with other student groups. That is, they are requesting to receive the same public benefits conferred on others who are equally situated. The School Board's purpose in allowing student groups to meet on school property has a manifestly "secular purpose" — encouraging student initiative and exchange in the marketplace of ideas. Its practical effect entails no entanglement between church and state. As to the "effect" of letting Respondents meet on the school campus, any benefits to religion are surely incidental to a policy designed to benefit all students. Denying Respondents permission to use school facilities out of a generalized, but unsubstantiated, fear of "establishing religion" only serves to discriminate against religion. This result is neither mandated nor permitted by the Constitution.[16]

D. Even If The Westside Club Program Were A Nonpublic Forum, Petitioners' Actions Would Be Constitutionally Prohibited Because They Amount To Discrimination Against Respondents' Viewpoint.

Even in a nonpublic forum, the decision of school officials to restrict protected speech is limited by the requirement that such actions not discriminate on the basis of viewpoint. Content-based restrictions of "sub-

[16]Also illustrative of the general point that the government cannot justify discriminating against religion out of general "establishment" fears is the Court's decision in *McDaniel v. Paty, supra.* In that case, the state sought to justify its constitutional provision precluding clergy members from holding elected office as necessary to prevent "the establishment of a state religion." *Paty*, 435 U.S. at 629. The Court held there was insufficient evidence that clergy participation in government would result in an establishment of religion to justify forcing ministers to forego their religious calling in order to exercise the right to hold public office enjoyed by other citizens. *Id.* So too in this case, the Respondents should not be denied a public benefit merely because they are asking the government to accommodate religious speech.

ject matter" are permissible in a nonpublic forum, but "viewpoint" restrictions are impermissible. *Cornelius*, 473 U.S. at 806. In the context of an educational institution, religion provides one of many perspectives for understanding any given subject matter. Accordingly, it contributes a "point of view . . . on an otherwise includible subject," *id.*, and thus may not be censored. As Justice Stevens observed in *Widmar*,

> Quite obviously . . . the University could not allow a group of Republicans or Presbyterians to meet while denying Democrats or Mormons the same privilege. It seems apparent that the policy under attack would allow groups of young philosophers to meet to debate the accuracy of the view that religion is the "opium of the people." If school facilities may be used to discuss anticlerical doctrine, it seems to me that comparable use by a group deserving to express a belief in God must also be permitted.

454 U.S. at 281 (Stevens, J., concurring).

That Petitioners discriminated against Respondents' religious viewpoint becomes clear when assessing their policy as to other views. The district court found that there was a calculated effort on the part of school officials to "encourage frank discussion of controversial issues" during instructional time. *Mergens*, slip op. at 13. Discussion topics included "drugs, separation of church and state, Vietnam protests, use of arm bands, atheism, abortion, homosexuality, birth control, premarital sex, nuclear war and Contra aid." *Id.* Nevertheless, one of the school administrators testified, somewhat ironically given the administration's avowed purpose of presenting a "balanced point of view" and "exposing students to all sides of controversial issues," that "permitting a sanctioned Christian group would stand in conflict with

this policy," *Id.*[17] It is curious that Westside officials have concluded that a religious perspective is too "unbalanced" to contribute to discussion of topics including separation of church and state, atheism, and a host of social issues such as birth control and homosexuality. This amounts to blatant viewpoint discrimination.

Although the school administrator's actions might have been well-intentioned, they were not constitutionally permissible. "[S]chools . . . may not be run in such a manner as to 'prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion'." *Board of Education v. Pico*, 457 U.S. 853, 876 (1982) (Blackmun, J., concurring in part and concurring in the judgment), *quoting, West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943). *See also, Hazelwood*, ___ U.S. ___, 108 S.Ct. at 577 (Brennan, J., dissenting).

CONCLUSION

Petitioners' decision to exclude Respondents from meeting after school on equal terms with other students is offensive to the First Amendment's protection of free speech and religious liberty, and is antithetical to our country's heritage. In the words of the *Williamsburg Charter*:

> [T]he Religious Liberty provisions hold the key to American distinctiveness and American destiny. Far from being settled by the interpretations of judges and historians, the last word on the First Amendment likely rests in a chapter yet to be written, documenting the unfolding drama of America. If religious lib-

[17] Not surprisingly, this same administrator removed a poster on a school bulletin board advertising an evangelistic speaker. *Id.*

> erty is neglected, all civil liberties will suffer. If it is guarded and sustained, the American experiment will be the more secure.

Id. p. 12.

Petitioners have not only neglected Respondents' religious liberty, they have been hostile to it. For this reason, and the reasons stated above, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

Albert L. Jordan
**Counsel of Record*

William S. Brewbaker III
Timothy S. Ritchie
Wallace, Brooke & Byers
2000 SouthBridge Parkway
Birmingham, Alabama 35209
(205) 870-0555

David M. Smolin
Assistant Professor of Law
Cumberland School of Law
Samford University
Birmingham, Alabama 35229

Counsel for Amicus